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No. 887 66

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

JULIUS SILVERMAN, MEYER SCHWARTZ, AND ROBERT L. MARTIN, *Petitioners*,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit affirming their convictions for violation of the District of Columbia gambling laws.

OPINIONS BELOW

The opinion of the District Court is reported at 166 F. Supp. 838 (R. 20). The opinion of the Court of Appeals has not yet been reported (App. 1a).

JURISDICTION

The judgment of the Court of Appeals was entered on February 4, 1960, and a petition for rehearing was denied on March 8, 1960 (App. 13a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

D.C. Code § 22-1502 (1951 ed.), 52 Stat. 198, as amended, 67 Stat. 95:

> "If any person shall, within the District of Columbia, knowingly have in his possession or under his control, any record, notation, receipt, ticket, certificate, bill, slip, token, paper, or writing, current or not current, used or to be used in violating the provisions of sections 22-1501, 22-1504, or 22-1508, he shall, upon conviction of each such offense, be fined not more than $1,000 or be imprisoned for not more than one year, or both. For the purpose of this section, possession of any record, notation, receipt, ticket, certificate, bill, slip, token, paper, or writing shall be presumed to be knowing possession thereof."

D.C. Code § 22-1504 (1951 ed.), 31 Stat. 1331:

> "Whoever shall in the District set up or keep any gaming table, or any house, vessel, or place, on land or water, for the purpose of gaming, or gambling device commonly called A B C, faro bank, E O, roulette, equality, keno, thimbles, or little joker, or any kind of gaming table or gambling device adapted, devised, and designed for the purpose of playing any game of chance for money or property, or shall induce, entice, and permit any person to bet or play at or upon any such gaming table or gambling device, or on the side of or against the keeper thereof, shall be punished by

imprisonment for a term of not more than five years."

D.C. Code § 22-1505 (1951 ed.), 31 Stat. 1331, as amended, 67 Stat. 95:

"(a) Any house, building, vessel, shed, booth, shelter, vehicle, enclosure, room, lot, or other premises in the District of Columbia, used or to be used in violating the provisions of section 22-1501 or 22-1504, shall be deemed 'gambling premises' for the purpose of this section.

"(b) It shall be unlawful for any person in the District of Columbia knowingly, as owner, lessee, agent, employee, operator, occupant, or otherwise, to maintain or aid or permit the maintaining of any gambling premises.

* * * * *

"(d) Whoever violates this section shall be imprisoned not more than one year or fined not more than $1,000, or both, unless the violation occurs after he has been convicted of a violation of this section, in which case he may be imprisoned for not more than five years, or fined not more than $2,000, or both."

QUESTION PRESENTED

Whether evidence obtained by federal officers through the use of a spike microphone inserted into a party wall, which enabled them to overhear everything said in the contiguous private dwelling house occupied by petitioners, is admissible against petitioners in a federal court.

STATEMENT

A four-count indictment was returned against petitioners in the United States District Court for the District of Columbia on July 30, 1958 (R. 256-257).

They were charged with operating a gambling enterprise from April 21 to April 30, 1958, in violation of D.C. Code §§ 22-1502, 22-1504, 22-1505, and 26 U.S.C. § 7262.

Petitioners promptly moved for the return and suppression of all evidence obtained during a search of their premises at 408 21st Street, N. W., in the District of Columbia (R. 257-258). They alleged that the federal officers who conducted this search were armed with an invalid search warrant, because the supporting affidavit was based upon information secured in violation of their rights under the Fourth Amendment and § 605 of the Communications Act. This motion also sought suppression of all evidence as to conversations within their premises which had been overheard by federal officers.

Petitioners' motion came on for hearing before Judge Alexander Holtzoff (R. 39). It was stipulated by counsel for the government that federal officers secured permission from the owner of 410 21st Street, a vacant house separated from petitioners' premises by a party wall, to use the vacant house for purposes of observation (R. 40). It was further stipulated that the officers slipped an electronic listening device under the baseboard of a room in the vacant house, enabling them to overhear everything said in petitioners' premises (R. 40). Government counsel stipulated that the device had a spike twelve inches long, which was inserted into the party wall six or seven inches but which did not go completely through the wall (R. 43). It was not disputed that the officers subsequently secured a search warrant upon the basis of what they had overheard with this instrument.

Judge Holtzoff denied petitioners' motion on the ground that the protection of the Fourth Amendment is limited to physical searches and seizures of physical objects, citing *Olmstead* v. *United States*, 277 U.S. 438; and *Goldman* v. *United States*, 316 U.S. 129 (R. 21). The court went on to hold that there was no violation of § 605 of the Communications Act and that there was no "trespass" sufficient to distinguish the *Goldman* decision, despite the fact that the federal agents admittedly penetrated the wall with the spike of the microphone (R. 23-24).

Subsequently the government obtained a five-count superseding indictment because of a technical defect in its original indictment (R. 7-8).[1] Petitioner renewed their motion to suppress, which was denied without argument by Judge Luther Youngdahl upon the authority of the prior ruling (R. 9-10, 19).

The case came on for trial before Judge Joseph R. Jackson. Objections to testimony given by the officers who had overheard petitioners' conversations with the electronic eavesdropping device were overruled upon the authority of the pretrial rulings (R. 53).

Two special agents of the Internal Revenue Service and a member of the District of Columbia Metropolitan Police Department testified in detail concerning their electronic surveillance of petitioners' premises. Prior to April 21, 1958, they entered the vacant house to determine the feasibility of using an electronic listening device (R. 93). They made tests with a so-called spike microphone which was inserted under the base-

[1] The United States Attorney obtained a superseding indictment because the word "knowingly" had been omitted from the third count of the original indictment (R. 256). The superseding indictment added a count framed under D.C. Code § 22-1508.

board of the vacant house several feet from the front wall (R. 99-100). This device consisted of a microphone with a spike eleven and three-fourths inches long attached to it, together with an amplifier, a power pack, and an earphone (R. 101-103). It was inserted into the party wall approximately halfway, at which point it met with resistance, and it was capable of transmitting conversations which took place anywhere in petitioners' house (R. 84, 98, 104).

The officers knew that petitioners' heating duct was located inside the party wall at the point where they inserted the spike (R. 144-148). They considered the possibility that it was making contact with the duct. They knew that for maximum effectiveness this type of microphone must come into contact with something which acts as a sounding board (R. 156-158).

Formal surveillance began on April 21 and continued on April 22, 23, 24, and 29. The officers inserted the spike microphone into the party wall on each of these dates except April 29. They testified that they overheard petitioners quote odds and accept bets on baseball games and prize fights over the telephone. The officers quoted many of petitioners' conversations before the jury (R. 62-68, 85-90, 123-125).

The officers secured arrest and search warrants on April 30. These warrants were based upon an affidavit which was in turn based upon the conversations overheard with the spike microphone (R. 12-18). The warrants were executed on the same date, and the officers testified that they found records of odds and bets on petitioners' premises. These were subsequently introduced into evidence (R. 11, 128-131). The officers testified that while they were searching the premises

they answered telephone calls from persons who wanted to place bets (R. 137-139, 167-168, 181-183).

Petitioners introduced the testimony of three witnesses who had participated in various experiments on their premises. These witnesses testified that there was a space in the party wall directly behind petitioners' heating duct which was not filled in with bricks (R. 209-211). There was an oval indentation in the shoe mold of the vacant house directly behind petitioners' heating duct, and there was a dent in the duct which was the same size as the end of the spike microphone (R. 209, 213, 222-223). When a similar spike was inserted through the indentation in the shoe mold it hit this dent in the duct (R. 215, 229). It was impossible to insert a spike into the party wall at any other point (R. 216, 223-224, 234). When a spike microphone comes into contact with a duct of this type, the entire heating system becomes a conductor of sound and every heating register in the house becomes a microphone (R. 228-229).

The jury convicted petitioners under the first three counts of the indictment and acquitted them under the remaining two counts (R. 26-27). They were sentenced to imprisonment for nine months and fined $500 on counts one (D.C. Code § 22-1502) and three (D.C. Code § 22-1505), and to imprisonment for twenty months to five years on count two (D.C. Code § 22-1504), the sentences to run concurrently (R. 29-34). The trial court granted bail pending appeal.

The Court of Appeals affirmed by a divided bench. The majority distinguished *Irvine* v. *California*, 347 U.S. 128, on the ground that it involved "the revolting 'bugging' of the bedroom of man and wife" (App. 9a).

It went on to hold that electronic eavesdropping "is not *such* unlawful search and seizure as is proscribed by the Fourth Amendment," citing *On Lee* v. *United States*, 343 U.S. 747. In a footnote, the majority stated that *On Lee* construed the *Goldman* case as leaving open the effect of an earlier trespass in order to conceal a listening device within defendant's premises.

Judge Washington filed a dissenting opinion. He pointed out that every inference and what little direct evidence there was pointed to the fact that the spike made contact with the heating duct, as the police admittedly hoped it would (App. 11a). The duct then became "a giant microphone" enabling the police to hear conversations on both floors of petitioners' house. In his view, it was immaterial whether the Fourth Amendment protects privacy only to the extent of banning unauthorized physical entry by the police, because he concluded that the conduct of the police violated our fundamental concept of ordered liberty, as embodied in the due process clause of the Fifth and Fourteenth Amendments.

REASONS FOR GRANTING THE WRIT

The scientific advances during the past two decades in the field of electronic eavesdropping devices, the increasing frequency of their use by federal officers, and the resulting threat to the security of the people in their homes from unreasonable auditory searches by federal officers commend the evidentiary problems posed by this case to review by this Court.

1. The decision of the court below is squarely contrary to the views expressed by this Court in *Irvine* v. *California*, *supra*. Eight members of this Court there held that the conduct of the state officers con-

stituted an unlawful search and seizure. Irvine's conviction was permitted to stand only because the states are free to use the fruits of an unlawful search and seizure. Here, however, we are confronted with similar conduct by federal officers and convictions in a federal court.[2]

It is unclear whether the majority below distinguished *Irvine* on the ground that it involved "revolting" police conduct or on the ground that it involved a "trespass" by the police in order to install the listening device within Irvine's premises. Neither of these distinctions is tenable.

The protection of the Fourth Amendment has never been contingent upon the considerations which governed this Court's decision in *Rochin* v. *California*, 342 U.S. 165. The legality of a search does not depend upon the degree of judicial revulsion which it engenders. And certainly the *Irvine* case cannot be restricted to devices concealed in the bedroom of man and wife, as suggested by the majority below. It has long been settled that the protection of the Fourth Amendment also extends to offices, whether used for the transaction of legal or illegal business. *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 357; *Gouled* v. *United States*, 255 U.S. 298, 307.

Nor can the *Irvine* case be distinguished on the ground that it involved an earlier trespass by the police in order to install the listening device. This Court has repeatedly recognized that the Fourth Amendment is a protection of privacy. *Jones* v. *United States*, No.

[2] This case must be distinguished *in limine* from cases where a conversation is broadcast or transcribed with the consent of one participant, as in *On Lee* v. *United States*, *supra*. Cf. *Chapman* v. *United States*, 271 F. 2d 593, certiorari denied, March 28, 1960.

69, October Term, 1959, decided March 28, 1960; *Frank* v. *Maryland*, 359 U.S. 360, 362-363; *Miller* v. *United States*, 357 U.S. 301, 306-307. This protection cannot be reduced to a prohibition of physical entry.

The fact which called forth this Court's condemnation in *Irvine* was not that the police had entered Irvine's home on several occasions in his absence, but rather that the police had been able to overhear every word spoken by Irvine and his wife in their bedroom for over a month. It was this invasion of privacy which so "flagrantly, deliberately, and persistently violated the fundamental principle declared by the Fourth Amendment as a restriction on the federal government." 347 U.S. at 132. If a microphone had been inserted into Irvine's bedroom wall from outside of the premises, it would have been an equally flagrant, deliberate, and persistent violation of his privacy and hence of the fundamental principle declared by the Fourth Amendment.

This case illustrates the absurdity of requiring a "trespass" as a condition precedent to unconstitutionality. The government has consistently urged that there was no "trespass", because the spike microphone did not penetrate into petitioners' "half" of the party wall and no officer entered petitioners' premises. Since the party wall was thirteen to fourteen inches in thickness, government counsel argued that there could be no "trespass" unless the spike was inserted into the wall at least six and one-half inches. The government contended that it had actually been inserted only five and seven-eighths inches or less, although the evidence was uncontroverted that the spike had to penetrate more than half of the wall in order to make contact with the heating duct. According to the government's

theory, petitioners' constitutional rights were preserved by five-eighths of an inch.

If justice is to be thus meted out by the inch—or, in this case, by eighths of an inch—the Fourth Amendment becomes a mockery. It is precisely for this reason that petitioners have consistently denied any necessity for a "trespass" as a condition precedent to unconstitutionality.

The court below agreed that such important constitutional rights cannot be measured in fractions of an inch. It failed to recognize, however, that if a "trespass" is not a condition precedent to unconstitutionality, then petitioners' Fourth Amendment rights were seriously invaded.

Only last month this Court reversed another decision of the court below in this field. *Jones* v. *United States*, *supra*. In language equally applicable to this case, Justice Frankfurter concluded "that it is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical."

Startling advances in the field of electronics have underscored the absurdity of the "trespass" concept. A recent study of wiretapping and eavesdropping published under the auspices of the Pennsylvania Bar Association Endowment shows that the traditional "bug" is rapidly becoming obsolete.[3] It describes con-

[3] Dash, Knowlton, and Schwartz, *The Eavesdroppers* (Rutgers University Press 1959), pp. 341, 346-358.

tact microphones similar to the device used in this case. It goes on to describe other devices, some in the production stage and some in the experimental stage, which can pick up conversations in a room from without. Surely the right of privacy guaranteed by the Fourth Amendment should not be contingent upon preservation of the scientific *status quo*.

Petitioners are at a loss to understand what the majority below meant when it said that this "is not *such* unlawful search and seizure as is proscribed by the Fourth Amendment" (App. 9a). This apparent distinction between illegal searches and seizures that are unconstitutional and illegal searches and seizures that are permissible calls for review by this Court. Illegality negates permissibility. Any illegal search and seizure is unreasonable and therefore unconstitutional.

Even if this Court should be unwilling to condemn the "trespass" concept, moreover, it must conclude that petitioners' constitutional rights were seriously violated. Here there was no detectaphone clamped to the other side of an interior office wall, as in the *Goldman* case. The officers inserted their device deep into petitioners' party wall.[1] They brought this device into contact with petitioners' heating duct and thereby converted petitioners' entire heating system into "a giant microphone." If the law requires a trespass, petitioners have more than satisfied this requirement.

2. Judge Washington has raised a second constitutional question which should be considered by this

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[1] It should be noted that, under District of Columbia law, adjacent landowners hold title to a party wall as tenants in common of the entire wall. *Fowler* v. *Kochler*, 43 App. D.C. 349; *Moore* v. *Shoemaker*, 10 App. D.C. 6.

Court. In his view, it becomes immaterial whether the Fourth Amendment is restricted to cases where a police officer physically enters the premises. He concluded that the police actions in this case were inconsistent with the concept of ordered liberty embodied in the due process clause of the Fifth and Fourteenth Amendments.

This Court has long recognized the close relationship between the Fourth Amendment and the self-incrimination clause of the Fifth Amendment. *Boyd* v. *United States*, 116 U.S. 616. It should now consider the relationship between the Fourth Amendment and the due process clause of the Fifth Amendment. If the Fourth Amendment must be construed as narrowly as it was construed by the majority below, this Court must turn to the more compendious guarantee of the Fifth Amendment to control technological assaults upon basic freedoms.

3. Apart from constitutional considerations, petitioners urge that their convictions should be reversed in the exercise of this Court's supervisory power over the administration of justice in the lower federal courts. This power concededly covers the formulation of evidentiary rules. *Mesarosh* v. *United States*, 352 U.S. 1, 14; *Holland* v. *United States*, 348 U.S. 121, 135, n. 7; *McNabb* v. *United States*, 318 U.S. 332, 340; and see *On Lee* v. *United States*, *supra*, dissenting opinion of Mr. Justice Black.

Judge Washington's opinion stresses the dangers of indiscriminate electronic surveillance. Few law enforcement methods have more frightening potentialities. This Court should decide whether a strong and free society needs convictions secured by such devices

before a spike microphone becomes standard equipment for federal law enforcement officers.

4. This case also raises an important question left unanswered by this Court's opinion in *Rathbun* v. *United States*, 355 U.S. 107. There this Court held that § 605 does not prohibit listening on an extension telephone with the consent of one party to the conversation. It is clear from the dissenting opinion of Justice Frankfurter that the case would have been otherwise decided if neither party had consented to such conduct. It is hence clear that actual "interception" is not required under the statute.

The Court was not called upon to determine whether the statute protects each party to a telephone conversation from devices designed to transmit his side of the conversation. Logically there would seem to be no reason why the statute should protect the parties against a mechanical device which transmits both sides of the conversation but not against a mechanical device which transmits only one side of the conversation. The distinction is one of degree rather than substance. Since virtually all of the conversations here involved were telephone conversations, this interpretation of the statute compels reversal of petitioners' convictions.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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April, 1960.